(2)

No. 96-618

Supreme Court, U.S.
FILED
NOV 18 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

GARY CHAVEZ,

Petitioner,

v.

CITY OF ARVADA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

THEODORE S. HALABY
Attorney of Record
ROBERT M. LIECHTY
HALABY CROSS
LIECHTY & SCHLUTER
1873 South Bellaire Street
Suite 1400
Denver, CO 80222
Telephone: (303) 691-5300

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

QUESTION PRESENTED

Whether this Court should accept *certiorari* review over a Title VII retaliation case which concerns solely the sufficiency of evidence necessary to prove retaliation.

STATEMENT OF THE CASE

The facts are correctly set forth by the Tenth Circuit, reproduced in petitioner's appendix B, pp. 4a-12a. For purpose of this Court's review, the pertinent parts are summarized as follows:

Petitioner Chavez was a long-time employee of the respondent City. He claimed that in 1987 he was discriminated against when he was not promoted. Two years later the same decision maker promoted him to a position in 1989 equal to that which Chavez sought in 1987.

Mr. Chavez claimed discrimination on two grounds. First, he claimed that a Mr. Schulz, in making recommendations to the decision maker (Mr. Culbertson[1]), retaliated against petitioner Chavez because Mr. Chavez had made an EEOC complaint 10 years earlier in 1977. The trial court premised its judgment against the City solely upon this claim of alleged retaliation.

Mr. Chavez also claimed that there was a racially hostile environment. The district court specifically found that any alleged hostile environment had little to do with Mr. Culbertson's decision not to promote Mr. Chavez in 1987. The Tenth Circuit correctly noted: "the district court rejected Chavez' suggestion that the hostile work environment was 'strong evidence' of discrimination when he was passed over for a promotion. . . . " Petitioner's appendix, p. 8a. The district court's judgment was premised upon being passed over for the promotion, not upon any injury from the hostile environment. Thus, petitioner's references to racial discrimination interspersed

---

[1] The district court found that Mr. Culbertson was not motivated by discriminatory animus; his only fault was in relying on factors that Mr. Schulz purportedly infected with such animus. *See* petitioner's appendix, p. 53a.

throughout his petition are completely irrelevant to the claimed injury.

The nub of the Tenth Circuit's holding (*see* petitioner's appendix, p. 14a) is purely an evidentiary matter. The district court found that after Mr. Schulz had administered the written test (which the district court found he had fairly administered and scored (*see* petitioner's appendix, p. 29a)), that Mr. Schulz and Mr. Chavez had a confrontation concerning how the written test had been scored and Mr. Schulz stated, " 'oh, no, you're not going to pull that one again on me.' " *See* petitioner's appendix, p. 49a. Mr. Schulz denied making the statement but the district court found he had said it. *Id.* The district court concluded that this statement, "you're not going to pull that one again on me," reflected Mr. Schulz' state of mind when he improperly graded the oral exam (Mr. Schulz was one of three oral examiners). Thus, the court found that Mr. Schulz' oral test score was a result of retaliation for petitioner's 1977 complaint. *Id.*, p. 51a.

As a result of Mr. Schulz' lower score on the oral exam, Mr. Chavez remained in a virtual tie with another employee seeking the promotion. Consequently, when the list of the finalists was sent to the decision maker (Mr. Culbertson), Mr. Culbertson determined that he had to choose between Mr. Chavez and the other applicant. Mr. Culbertson then did his own interview and considered recommendations from three people, one of whom was Mr. Schulz. On the basis of this second phase of the promotion process, Mr. Culbertson chose the other applicant. The only discrimination regarding the entire process was Mr. Schulz' input into the process.

The Tenth Circuit reversed upon one ground: that the statement "you're not going to pull that one again on me" was insufficient to show the necessary retaliatory animus.

See petitioner's appendix, p. 14a. The Tenth Circuit noted that "[t]he statement itself is in our view equivocal; whether it refers to the 1977 episode or something occurring in the intervening 10 years is pure guesswork. But for that one bit of evidence, the City, under the described circumstances, would have to prevail. And that short utterance attributed to Schulz by Chavez is not enough to change the result." *See* petitioner's appendix, p. 16a. Because there was no other evidence of retaliation, the Tenth Circuit reversed the district court's judgment and directed that judgment be entered in favor of the City. *Id.* p. 16a.

ARGUMENT

The matter presented to this Court is solely a question regarding the sufficiency of evidence to prove a retaliation claim, which issue does not require the attention of this Court. Nothing more need be said because the evidentiary issue was the dispositive issue decided by the circuit. Nor is the matter one arising under ***Anderson v. Bessemer City,*** 470 U.S. 564 (1985), in which a circuit court employed the wrong standard of review in determining that a trial court's findings were clearly erroneous. The circuit court was clear in its holding: the only evidence upon which the claimed retaliation was based was insufficient to prove retaliation. Therefore, once this evidence was discarded, there could be no discrimination and, hence, judgment properly entered in favor of the City.

Petitioner represents that there is a split of authority on the evidentiary issue. *See* petition, p. 6. That is not the case because there is no other circuit that has addressed the issue regarding sufficiency of the evidence in this context. In fact, the case that petitioner cites for the split in authority (***Booth v. Birmingham News Co.,*** 704 F.Supp.

213, 216 (D.Ala. 1988), ***aff'd without opinion,*** 864 F.2d 793 (11th Cir. 1988), ***see*** petition, p. 7) stands for the opposite proposition. In ***Booth,*** the plaintiff attempted to prove retaliation by having the court presume that the short length of time between the adverse employment decision and the protected conduct demonstrated the necessary retaliatory intent. The district court stated that it would not apply any such presumption but that plaintiff needed to prove the causal connection. ***See also Collins v. State of Illinois,*** 830 F.2d 692, 704 (7th Cir. 1987), cited on page 8 of the petition, discussing whether closeness in time raises a presumption of retaliation and holding that it was for the jury to decide. Such a claimed presumption based on closeness in time is a far cry from the Tenth Circuit's holding in the instant case which states that a ten-year gap in time, without any other hint of retaliatory motive, is insufficient evidence to raise a presumption of retaliation.

Petitioner also argues throughout his petition that when the district court found that Mr. Schulz actually said "you're not going to pull that one on me again," that this was direct evidence of retaliation. ***See, e.g.,*** petition, p. 7. However, the Tenth Circuit found that because of the 10 year gap, it was mere speculation to characterize this as evidence of retaliation, be it direct or indirect. The Tenth Circuit correctly noted that "[t]he statement itself is in our view equivocal; whether it refers to the 1977 episode or something occurring in the intervening 10 years is pure guesswork." ***See*** petitioner's appendix, p. 16a. The Tenth Circuit also noted that "there is nothing in the record before us to indicate that there was continuing friction between the City and Chavez from 1977, the year of the protected activity, and 1987, the year of the adverse employment action." ***Id.,*** p. 14a. In short, the district court made a leap of faith that was not merited on the

facts of this case and the Tenth Circuit reversed on evidentiary grounds only. There is no reason for this Court to interfere with this straightforward evidentiary matter.

Finally, petitioner argues that the Tenth Circuit erred because it did not remand the matter for consideration as to whether petitioner would prevail under the *McDonnell-Douglas* test. *See, e.g.,* petition, p. 9. Petitioner completely misunderstands the nature of the evidentiary question. When the Tenth Circuit found that there was insufficient evidence that Mr. Schulz' actions in 1987 were retaliation for the 1977 incident, the circuit court found that plaintiff could not prevail on the retaliation claim, no matter what the theory of proof. Consequently, when petitioner argues that he needs a second opportunity to try to prove his case under the traditional burden shifting test of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973), that issue became moot by the fact that there is no evidence of retaliation. Ultimately, a plaintiff bears the burden to show discrimination, *see, e.g., St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993), which petitioner herein cannot do under any theory of proof.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

THEODORE S. HALABY
Attorney of Record
ROBERT M. LIECHTY
HALABY CROSS
LIECHTY & SCHLUTER
1873 South Bellaire Street
Suite 1400
Denver, CO 80222
Telephone: (303) 691-5300

Attorneys for Respondent